

NOV 21 2001

UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
Washington, D.C. 20231
www.uspto.gov

David E. Bruhn
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402

In re Application of
SCHULTZ *et al*
U.S. Application No.: 09/673,406
PCT No.: PCT/US99/08207
Int. Filing Date: 15 April 1999
Priority Date: 17 April 1998
Attorney Docket No.: 6338.02 DEB
For: EVACUATOR

DECISION ON
PETITION TO WITHDRAW
HOLDING OF ABANDONMENT

This decision is in response to applicants' "Renewed Petition to Withdraw the Holding of Abandonment" ("Ren.Pet.") filed via facsimile on 19 September 2001. No fee is required.

BACKGROUND

On 10 September 2001, a decision dismissing applicants' petition to withdraw the holding of abandonment was mailed because applicants failed to meet all of the requirements outlined in the MPEP. Specifically, applicants did not attest that a search of the file jacket and docket records was accomplished and the docket report submitted showed only the subject application.

On 09 April 2001, applicants submitted via facsimile the instant renewed petition which included, *inter alia*, a copy of counsel's docket records for 30 November 2000.

DISCUSSION

Nonreceipt of an Office Action

To establish nonreceipt of an Office communication, applicants must provide: (1) a statement from the practitioner declaring that the Office communication was not received by the practitioner; (2) a statement attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received; and, (3) a copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioners' statement. See MPEP § 711.03(c) pg. 700-140 (August 2001). In the original petition filed 24 July 2001, applicants satisfied item (1).

In the renewed petition, applicants' attorney "attests that a search and review of

the docket file and docket records was made.” Ren.Pet. ¶ 3. This statement satisfies item (2). Moreover, applicants submitted “a copy of the undersigned’s docket records for 30 November 2000 showing items due that day, and not including a deadline for the subject application.” *Id.* at ¶ 4. A review of the docket records submitted verifies that nothing was listed in the above-captioned application as being due. This meets the requirements for item (3).

Accordingly, applicants have now met the requirements required to establish nonreceipt of an Office action.

Altered Declaration

A review of the declaration submitted via facsimile on 24 July 2001 reveals that it is not in compliance with 37 CFR 1.497. Specifically, a new address for Kevin W. Gracie is listed under his name on the declaration submitted via facsimile. It appears that this new address, (*i.e.*, 403 Monroe Pl. Hopkins, MN 55343) was added after Mr. Gracie signed the declaration. Section 602.01 of the MPEP states, in part (emphasis added):

The wording of an oath or declaration cannot be amended, altered or changed in any manner after it has been signed.

If the wording is not correct, or if all of the required affirmations have not been made, or if it has not been properly subscribed to, a new oath or declaration must be required.

In addition, section 605.04(a) of the MPEP states, in part (emphasis added):

[I]t is emphasized that the application filed must be the application executed by the applicant and it is improper for anyone, including counsel, to alter, rewrite, or partly fill in any part of the application, including the oath or declaration, after execution of the oath or declaration by the applicant.

In this case, the post-execution addition of a different address for Mr. Gracie is improper. Accordingly, the declaration filed 24 July 2001 cannot be accepted because it was not properly executed pursuant to 37 CFR 1.497(a)(1).

CONCLUSION

Accordingly, applicants’ request to withdraw the holding of abandonment is hereby **GRANTED**.

However, the declaration submitted on 24 July 2001 was not in compliance with 37 CFR 1.497(a)(1) for the reason listed above. Applicants must provide a declaration in compliance with 37 CFR 1.497 within **TWO (2) MONTHS** from the mail date of this

decision. Extensions of time pursuant to 37 CFR 1.136 are available. Failure to comply will result in the abandonment of this application.

Please direct further correspondence with respect to this matter to the Assistant Commissioner for Patents, Box PCT, Washington, D.C. 20231, and address the contents of the letter to the attention of the International Division, Legal Staff.



Leonard Smith
PCT Legal Examiner
PCT Legal Office



James Thomson
Attorney Advisor
PCT Legal Office

Tel.: (703) 308-6457